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In the Supreme Court of the United States

OCTOBER TERM, 1990

JAYNE BRAY, ET AL., PETITIONERS

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a conspiracy to deter pregnant women from obtaining abortions involves the kind of class-based animus required by 42 U.S.C. 1985(3).

2. Whether obstructing access to a medical facility deprives out-of-state patients of their constitutional right of interstate travel.

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INTEREST OF THE UNITED STATES

Various acts of Congress exclude abortion services from the ambit of federal medical assistance programs. See, *e.g.*, 20 U.S.C. 1688; 42 U.S.C. 300a-6 (Title X family planning programs); 42 U.S.C. 300z (Adolescent Family Life Act); Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (Hyde Amendment). A decision by this Court that opposition to abortion is a form of gender-based discrimination could bring those laws into question, on the ground that they violate equal protection principles underlying the Due Process Clause by discriminating against women. The United States also participated as amicus curiae in two earlier cases involving the scope of 42 U.S.C. 1985(3), *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), and *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979), and was a party in *United States* v. *Guest*, 383 U.S. 745 (1966),

which involved a closely related federal criminal statute, 18 U.S.C. 241.[1]

STATEMENT

1. Petitioner Operation Rescue is an unincorporated association with the principal goals of preventing abortions and ending the legalization of abortion. Operation Rescue seeks to achieve these goals by, among other means, conducting "rescue" demonstrations at abortion clinics. Petitioners also include six individuals who oppose abortion and its legalization, and who participate in demonstrations organized and planned by Operation Rescue. Respondents are nine abortion clinics located in the greater Washington, D.C., metropolitan area [2] and five organizations that seek to establish and preserve access to abortion. Pet. App. 16a, 18a-20a.

During "rescue" demonstrations, petitioners obstruct the entrances to and exits from an abortion clinic, thereby effectively closing the clinic temporarily, preventing abortions from being performed for that period, and "rescuing" the fetuses that would otherwise have been aborted. Pet. App. 18a. The purpose of these demonstrations, as described in Operation Rescue's literature, is to "intervene between abortionists and the innocent victims," by "*physically* blockading abortion mills with [human] bodies." *Id.* at 20a (quoting *Operation Rescue, National Day of Rescue—October 29, 1988* (1988)). During

[1] The United States, in addition, has participated in the defense of actions brought against federal officers and employees under 42 U.S.C. 1985(3). *E.g., Martinez* v. *Winner*, 771 F.2d 424 (10th Cir. 1985) (federal prosecutors); *Jafree* v. *Barber*, 689 F.2d 640 (7th Cir. 1982) (FBI agents); *Gillespie* v. *Civiletti*, 629 F.2d 637 (9th Cir. 1980) (U.S. marshals).

[2] The Washington metropolitan area encompasses the District of Columbia; Prince Georges and Montgomery Counties in Maryland; and Arlington County, Fairfax County, the City of Fairfax, the City of Falls Church, Loudon and Prince William Counties, and the City of Alexandria in Virginia. Pet. App. 17a n.2.

such a demonstration, no person—male or female—is allowed by the demonstrators to enter the clinic.[3]

2. Respondents brought this action in the United States District Court for the Eastern District of Virginia, seeking, among other things, to enjoin petitioners from impeding access to certain medical facilities. In their complaint, respondents asserted that petitioners had violated 42 U.S.C. 1985(3) by conspiring to interfere with respondents' rights to travel interstate and to obtain abortions. Respondents included in their complaint pendent state law claims for trespass, public nuisance, and tortious interference with business relationships. Pet. App. 27a.

Following an expedited hearing, the district court entered a temporary restraining order, barring petitioners from conducting demonstrations at certain medical facilities. Pet. App. 6a. After a trial, the court issued a permanent injunction, barring petitioners from "trespassing on, blockading, impeding, or obstructing access to or egress from the [listed] premises." *Id.* at 11a. The court found that "[s]ubstantial numbers of women seeking the services of clinics in the Washington Metropolitan area travel interstate to reach the clinics," *id.* at 22a, and held that petitioners had violated 42 U.S.C. 1985(3) by conspiring "for the purpose, either directly or indirectly, of depriving women seeking abortions and related medical and counselling services, of the right to travel," Pet. App. 29a-30a.[4]

[3] [W]hile the child-killing facility is blockaded, no one is permitted to enter past the rescuers, *neither women nor men.* Doctors, nurses, patients, staff, abortion-bound women, families of abortion-bound women—all are prevented from entering the abortuary while the rescue is in progress.

J.A. 25 (Affidavit of Randall Terry) (emphasis added). The above quotation also is included in the district court's opinion, except that the district court's opinion omits the phrase "neither men nor women." See Pet. App. 20a.

[4] The dates for the demonstrations that petitioners had planned for November 1989 had passed by the time that the district court

In reaching that conclusion, the district court acknowledged that, under this Court's decisions in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), and *United Brotherhood of Carpenters & Joiners* v. *Scott*, 463 U.S. 825 (1983) (*Carpenters* v. *Scott*), a plaintiff must prove the following four elements in order to establish a violation of Section 1985(3): (1) the defendant engaged in a conspiracy; (2) the defendant did so for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws; (3) a co-conspirator took some act in furtherance of the conspiracy; and (4) a person was thereby injured in his person or property, or was deprived of a right or privilege enjoyed by a citizen of the United States. Pet. App. 27a-28a, citing *Griffin* v. *Breckenridge*, 403 U.S. at 102-103, and *Carpenters* v. *Scott*, 463 U.S. at 828-829. The court concluded that respondents had easily satisfied the first, third, and fourth elements of the *Griffin* test. Pet. App. 28a-31a. With regard to the second element, the court held that "gender-based animus satisfies the 'purpose' element of Section 1985(3)," and that "a conspiracy to deprive women seeking abortions of their rights guaranteed by law is actionable under Section 1985(3)" because respondents' "members and patients constitute a subset of a gender-based class." Pet. App. 28a-29a. The court did not decide whether petitioners also had violated Section 1985(3) by obstructing respondents' right to obtain an abortion, noting that respondents' claim in this regard was "problematic" because of the "likely absence of state action on these facts," Pet. App. 31a-32a. See also *id.* at 31a-33a. The court also held that respondents were entitled to relief under their state law trespass and public nuisance theo-

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issued the permanent injunction. Nonetheless, relying on the "capable of repetition, yet evading review" doctrine, the district court ruled that the case was not moot. Pet. App. 25a-26a.

ries, but not on their claim for tortious interference with business relationships. *Id.* at 33a-36a.[5]

3. Petitioners appealed, and the court of appeals affirmed in a per curiam opinion. Pet. App. 1a-9a.[6] The court stated that the district court's "holding that gender-based animus satisfie[d] the 'purpose' element of § 1985(3) has been forecast by" earlier Fourth Circuit case law. *Id.* at 8a. Moreover, agreeing with the Second Circuit, the court held that "blocking access to medical services provided by abortion facilities which serve an interstate clientele violates the constitutional right to travel." Pet. App. 8a, citing *New York State NOW* v. *Terry*, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 110 S. Ct. 2206 (1990). The court did not decide whether Section 1985(3) encompasses violations of a right to privacy. Pet. App. 9a.[7]

SUMMARY OF ARGUMENT

I. In *Griffin* v. *Breckinridge*, 403 U.S. at 102, this Court concluded that Section 1985(3) requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." No such invidiously discriminatory purpose is present here. Petitioners do not aim their anti-abortion demonstrations exclusively at women; nor do petitioners harbor a gender-based animus. Petitioners target their actions at anyone

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[5] The permanent injunction was originally set to terminate on July 31, 1990, but the district court subsequently extended the order on two occasions. Pet. App. 57a. The order is now scheduled to expire on September 24, 1991. By its own terms, however, the injunction may be extended for good cause shown. *Id.* at 60a.

[6] Respondents appealed the district court's denial of broader injunctive relief. The court of appeals upheld the district court's judgment in this respect, Pet. App. 8a-9a, and respondents did not seek review in this Court of that aspect of the judgment below.

[7] The Fourth Circuit also upheld the district court's refusal to dismiss the state law claims and to award respondents attorneys fees and costs. Pet. App. 9a.

—male or female—who is involved in the abortion process. In fact, it is more accurate to say that petitioners' demonstrations are targeted at abortion itself than at persons of any particular gender.

Opposition to abortion is not a form of gender-based discrimination, even though only women can have abortions. Like the Equal Protection Clause, Section 1985(3) does not provide a remedy for conduct that only has a disproportionate effect on women; it requires proof of invidious discrimination. Treating women differently because they seek an abortion is not a form of invidious discrimination on the basis of gender. The Court has held that treating women differently due to pregnancy is not necessarily a form of gender discrimination. *Geduldig* v. *Aiello*, 417 U.S. 484, 496-497 n.20 (1974). That principle applies with greater force in the case of abortion, since "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris* v. *McRae*, 448 U.S. 297, 325 (1980).

II. The Court has held that the Constitution protects the right to travel interstate, and that Section 1985(3) provides a damages remedy for a violation of that right by private parties. The Court's cases, however, have not found that the right to travel interstate is violated in the absence of purposeful conduct discriminating against that right. In this case, the district court did not find that petitioners hold demonstrations for the principal purpose of preventing respondents from travelling interstate, nor did the courts below hold that petitioners' actions discriminate against out-of-state residents. Respondents therefore have not proved a violation of their right to travel interstate.

ARGUMENT

I. A CONSPIRACY TO DETER PREGNANT WOMEN FROM HAVING ABORTIONS DOES NOT INVOLVE THE KIND OF CLASS-BASED ANIMUS REQUIRED BY 42 U.S.C. 1985(3)

A. Introduction

Section 1985(3) of Title 42 does not provide a damages remedy for all conspiracies that injure a person in the exercise of legal rights.[8] By its terms, Section 1985(3)

[8] As noted above, the district court relied on Section 1985(3) (along with ancillary state law claims) as a basis for enjoining future demonstrations by petitioners. In entering that injunction, however, the district court did not address the question whether Section 1985(3) authorizes a district court to award injunctive relief, as opposed to damages. In our view, it is doubtful that the district court had the power under Section 1985(3) to enter an injunction against petitioners.

By its terms, Section 1985(3) provides only that a plaintiff "may have an action *for the recovery of damages* * * * against any one or more of the conspirators" (emphasis added). In this regard, Section 1985(3) differs sharply from 42 U.S.C. 1983, which also derives from the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13. See *id.* § 1, 17 Stat. 13 (original version of Section 1983); *id.* § 2, 17 Stat. 13-14 (original version of Section 1985(3)). In contrast to Section 1985(3), Section 1983 authorizes "action[s] at law, *suit*[s] *in equity*, or other proper proceeding[s] *for redress*" (emphasis added). In light of the affirmative provision for damages in Section 1985(3), the absence of any reference to injunctive relief in that law, and the contrast between Sections 1983 and 1985(3) with respect to the type of relief that can be awarded, it is unlikely that Congress authorized the courts to award injunctive relief when in 1871 it adopted what is now Section 1985(3). See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Gozlon-Peretz* v. *United States*, 111 S. Ct. 840, 847 (1991); *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2534 (1990). Moreover, this Court has made clear that Section 1985(3) provides no substantive rights itself, and is only

applies only to those conspiracies whose "purpose [is to] depriv[e] * * * any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." Two decades ago, in *Griffin* v. *Breckenridge*, this Court interpreted that clause to mean that there must be "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102 & n.10. *Griffin*

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remedial. *Carpenters* v. *Scott*, 463 U.S. at 833; *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 372 (1979). This situation is therefore quite unlike the one that this Court addressed in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969). There, this Court addressed the question whether a remedy could be fashioned when a statute, 42 U.S.C. 1982, conferred substantive rights without also authorizing a specific remedy. By contrast, here the substantive right must be found elsewhere; the only purpose of the statute is to provide a remedy; and that remedy by its terms is limited to damages. Nonetheless, some courts have held that injunctive relief is available under Section 1985(3). See *Mizell* v. *North Broward Hosp. Dist.*, 427 F.2d 468, 473 (5th Cir. 1970); *Action* v. *Gannon*, 450 F.2d 1227, 1237-1238 (8th Cir. 1971) (en banc). Neither case, however, is persuasive. *Mizell* relied on a dictum in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 414 (1968), and on *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. at 238-240, which is inapposite, as explained above. *Action* simply relied on *Mizell*. Several district courts in cases like this one have entered preliminary injunctions, see, *e.g.*, *NOW* v. *Operation Rescue*, 726 F. Supp. 300, 305 (D.D.C. 1989), or permanent injunctions, see, *e.g.*, *Roe* v. *Operation Rescue*, 710 F. Supp. 577, 589 (E.D. Pa. 1989), without addressing the question whether injunctive relief is available under Section 1985(3).

This case does not require the Court to answer that question. Neither court below addressed it; petitioners did not include it as a Question Presented in their certiorari petition; and it does not go to the jurisdiction of the federal courts to adjudicate this case. Under these circumstances, there is no reason to resolve that question here. See *Air Courier Conf. of America* v. *American Postal Workers' Union*, 111 S. Ct. 913, 917 (1991). Nonetheless, because federal officers have been sued under Section 1985(3), see page 2 note 1, *supra*, we mention this question in order to ensure that this Court does not inadvertently resolve it (or suggest that the Court has resolved it) without the benefit of a complete presentation in an appropriate case.

derived its construction of Section 1985(3) from its text and from the legislative history of the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, which revealed that Congress did not intend Section 1985(3) to serve as a general federal tort law. 403 U.S. at 101-102 & n.10. Applying that class-based animus requirement, *Griffin* concluded that allegations of a conspiracy to deprive individuals, because of their race, of equal protection of the law, or of equal privileges and immunities under the law, are actionable under Section 1985(3). 403 U.S. at 103. Since *Griffin*, this Court reaffirmed the principle that Section 1985(3) supplies a remedy only for conspiracies motivated by an invidiously discriminatory animus, stating that this conclusion represents "the authoritative construction of the statute." *Carpenters* v. *Scott*, 463 U.S. at 835. See also *id.* at 849 (Blackmun, J., dissenting). See *Kush* v. *Rutledge*, 460 U.S. 719, 725-726 (1983); *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979).[9]

In this case, the district court took two steps in order to characterize petitioners' motives for its anti-abortion demonstrations as an "invidiously discriminatory animus." First, the court held that Section 1985(3) encompasses not only racial animus but gender-based animus as well. Pet. App. 28a-29a. Second, the court ruled that petitioners' efforts to deter pregnant women from having abortions constitutes gender-based animus for purposes of Section 1985(3). Pet. App. 29a-30a. The court of appeals endorsed both propositions, albeit in a summary fashion. *Id.* at 8a. Most of the other courts that have addressed this question have followed the same analysis.[10]

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[9] The *Griffin* requirement that the defendant act with an invidiously discriminatory animus does not also demand, for example, that the plaintiff be a member of a racial minority. A white civil rights worker could recover damages under Section 1985(3) if he was the victim of an assault motivated by bias against blacks.

[10] See, *e.g.*, *New York State NOW* v. *Terry*, 886 F.2d at 1358-1359; *Southwestern Medical Clinics of Nevada, Inc.* v. *Operation Rescue*, 744 F. Supp. 230 (D. Rev. 1989); *Cousins* v. *Terry*, 721

This Court has never decided whether Section 1985(3) reaches gender-based animus.[11] *Griffin* expressly declined

F. Supp. 426, 430 (N.D.N.Y. 1989); *Portland Feminist Women's Health Center* v. *Advocates for Life, Inc.*, 712 F. Supp. 165, 169 (D. Or. 1988); *Roe* v. *Operation Rescue*, 710 F. Supp. at 581; *New York State NOW* v. *Terry*, 704 F. Supp. 1247, 1259 (S.D.N.Y.), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 110 S. Ct. 2206 (1990). Contra *Mississippi Women's Medical Clinic* v. *McMillan*, 866 F.2d 788 (5th Cir. 1989); *National Abortion Fed'n* v. *Operation Rescue*, 721 F. Supp. 1168, 1171 (C.D. Cal. 1989). Cf. *Roe* v. *Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), cert. denied, 484 U.S. 848 (1987).

The courts below did not decide whether Section 1985(3) reaches violations of a right to privacy. Pet. App. 9a, 31a-33a. That question is materially different from the one that those courts discussed in this case. This Court held in *Carpenters* v. *Scott*, 463 U.S. at 831-834, that a plaintiff must prove that a conspiracy involved state action when the conspiracy is directed against a right (there, the First Amendment) that by definition is protected only against state action. "[T]he right to an abortion" discerned in *Roe* v. *Wade* would also fit into that category since it was "derived from the Due Process Clause," *Webster* v. *Reproductive Health Services*, 109 S. Ct. 3040, 3058 (1989) (plurality opinion), citing *Roe* v. *Wade*, 410 U.S. 113, 164 (1973); see also *Harris* v. *McRae*, 448 U.S. 297, 312 (1980), which protects individuals only against state action, *Carpenters* v. *Scott*, 463 U.S. at 831-832.

The lower courts are divided on that question. The district court in *New York State NOW* v. *Terry*, 704 F. Supp. at 1260, held that Section 1985(3) encompassed a conspiracy to deny women the right to have an abortion. An Eighth Circuit panel came to the same conclusion, *Lewis* v. *Pearson Foundation, Inc.*, 908 F.2d 318, 322, but that opinion was vacated when rehearing en banc was granted, and the en banc court, by an equally divided vote, affirmed the district court's judgment dismissing the plaintiff's complaint, 917 F.2d 1077 (1990). Most district courts have held that Section 1985(3) does not reach a right to abortion, or have not resolved the issue. *E.g.*, *Portland Feminist Women's Health Center* v. *Advocates for Life, Inc.*, 712 F. Supp. at 168; *Roe* v. *Operation Rescue*, 710 F. Supp. at 583. The Court need not resolve that issue in this case, however, because the lower courts did not do so.

[11] The Members of this Court have divided over this question. Compare *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. at 385 & n.7 (Stevens, J., concurring) (Congress did not envision that Section 1985(3) would reach claims of gender-based

to decide "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable" under Section 1985(3). 403 U.S. at 102 n.9. The Court again left that question open in *Carpenters* v. *Scott*, which held that Section 1985(3) does not protect workers who refuse to join a union. The Court wrote that "it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans." 463 U.S. at 836.

On the one hand, nothing in the text of Section 1985(3) indicates an affirmative intention to reach conspiracies based on gender, and it would be fanciful to ascribe such an intent to the 1871 Congress. The immediate object that Congress had in mind for this law was "to combat the prevalent animus [in the South] against Negroes and their supporters." *Carpenters* v. *Scott*, 463 U.S. at 836. Beginning in 1866, the Ku Klux Klan conducted a campaign of assault, terror, and murder against the newly freed slaves and their sympathizers, and became virtually a shadow government in the formerly rebellious States because of the inability or unwillingness of state officials to control the widespread violence. "The Klan's goal was to overthrow Republican Reconstruction policies both by terrorizing local supporters of those policies in

animus), with *id.* at 389 n.6 (White, J., dissenting) (Section 1985(3) reaches gender-based discrimination) and *Carpenters* v. *Scott*, 463 U.S. at 853 (Blackmun, J., dissenting) (expressing the view that gender-based animus was a "class trait[]" that met the animus requirement). Several circuit and district courts have held that Section 1985(3) reaches gender-based animus. *New York State NOW* v. *Terry*, 886 F.2d at 1358-1359; *Volk* v. *Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988); *Life Ins. Co. of N. Am.* v. *Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979); *Novotny* v. *Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235 (3d Cir. 1978) (en banc), rev'd on other grounds, 442 U.S. 366 (1979); *Conroy* v. *Conroy*, 575 F.2d 175, 177 (8th Cir. 1978); pp. 9-10 note 10, *supra* (collecting district court decisions). See *Long* v. *Laramie County Community College Dist.*, 840 F.2d 743, 750-752 (10th Cir.) (implicitly assuming that Section 1985(3) reaches gender-based animus), cert. denied, 488 U.S. 825 (1988).

order to place sympathetic Democrats in office, and when that failed by supplanting the authority of local officials with mob violence." *Id.* at 850 n.15 (Blackmun, J., dissenting).[12] For these reasons, the Court has expressed doubt that Section 1985(3) "went any farther than its central concern—combating the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Carpenters* v. *Scott*, 463 U.S. at 837. On the other hand, the breadth of the terms used in the statute—"[a] purpose of depriving * * * any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws"—could be read to encompass gender-based animus.[13]

Here, as in *Griffin* and *Carpenters* v. *Scott*, there is no need to answer that question in order to resolve this case, because the judgment below must be reversed for other reasons. Even if Section 1985(3) is broad enough to reach gender-based animus, the actions taken by petitioners are not a form of gender-based discrimination. See pp. 13-20, *infra*. Moreover, describing the class here

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[12] See also, *e.g.*, *Briscoe* v. *LaHue*, 460 U.S. 325, 337-340 (1983); *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 610-611 n.25 (1979); *District of Columbia* v. *Carter*, 409 U.S. 418, 425-429 (1973); *Griffin* v. *Breckenridge*, 403 U.S. at 99-102.

[13] The Court has said that "there is some legislative history to support the view that § 1985(3) has a broader reach" than racially based animus alone. *Carpenters* v. *Scott*, 463 U.S. at 836. In this regard, the Court has pointed to a floor statement of Senator Edmunds, the manager of the bill on the Senate floor, that "if a conspiracy were formed against a man 'because he was a Democrat, * * * or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, . . . then this section could reach it.'" *Id.* at 836-837, quoting Cong. Globe, 42d Cong., 1st Sess. 567 (1871). At the same time, the Court has noted that "[t]he provision that is now § 1985(3), however, originated in the House. The narrowing amendment, which changed § 1985(3) to its present form, was proposed, debated, and adopted there, and the Senate made only technical changes to the bill." *Carpenters* v. *Scott*, 463 U.S. at 837.

as the class of "women seeking abortions" does not further the analysis under Section 1985(3). See pp. 20-23, *infra*. The courts below therefore erred in concluding that respondents stated a claim against petitioners that could be redressed under Section 1985(3).

B. Opposition To Abortion Is Not An Invidious Class-Based Discrimination Against Women Under Section 1985(3)

1. Operation Rescue and its members do not aim their anti-abortion activities exclusively at women. Rather, as the district court found, petitioners direct their actions at anyone, whether male or female, who assists or is involved in the abortion process—doctors, nurses, counsellors, boyfriends, husbands and family members, staff, and others. Pp. 3-4, *supra*. Indeed, it is more accurate to say that petitioners' activities are targeted at the abortion *process* itself, rather than at persons of any particular gender. Petitioners' goal, the district court noted, is to 'intervene between abortionists and the innocent victims." Pet. App. 20a (quoting *Operation Rescue, National Day of Rescue—October 29, 1988* (1988)). The fact that Operation Rescue's demonstrations are directed toward and operate against both men and women is a strong indication that its actions do not constitute the type of "discrimination" at which Section 1985(3) was aimed.

The Fifth Circuit's decision in *Mississippi Women's Medical Clinic* v. *McMillan*, 866 F.2d 788 (1989), is instructive in this respect. There, abortion protestors picketed a medical clinic that performed abortions, and the clinic sought to enjoin the picketing under Section 1985(3). The court concluded that the clinic was not entitled to an injunction, because the clinic did not show that the protestors acted with "an invidious discriminatory *animus*." 866 F.2d at 794. As the court explained, "the record indicates that the protestors do not target their pro-life advocacy at any particular group. The protestors (who are made up of both men and women) confront and try to persuade to their point of

view all groups—men, women of all ages, doctors, nurses, staff, the female security guards, etc." *Ibid.* "In fact," the Fifth Circuit pointed out, "the animus of the protestors is to dissuade *anyone* who contributes to the incidence of abortions." *Ibid.* For these reasons, the Fifth Circuit concluded that the clinic had failed to show that the abortion protestors were motivated by a class-based animus, as required by *Griffin* and *Carpenters* v. *Scott*.

That is likewise the case here, in light of the district court's factual findings. "The purpose of these 'rescue' demonstrations," the district court found, "is to disrupt operations at the target clinic and indeed ultimately to cause the clinic to cease operations entirely." Pet. App. 20a. "By disrupting and blockading family planning and abortion clinics," the district court also found, "[petitioners] and their followers hope (i) to prevent abortions, (ii) to dissuade women from seeking a clinic's abortion services, and (iii) to impress upon members of society the moral righteousness and intensity of their anti-abortion views." *Ibid.* Those factual findings, which were not disturbed by the court of appeals, reveal that the demonstrations conducted by Operation Rescue have as their motive an opposition to abortion and thus are conducted for a purpose other than animosity toward women.

Petitioners' opposition to abortion also cannot be characterized as gender-based discrimination because that opposition does not implicate all women. Rather, as the district court recognized, petitioners' opposition to abortion implicates only a "subset" of women: those women who seek an abortion or abortion counselling. Pet. App. 29a. That "subset" is in fact a minority of the class of all women, since the district court did not find that most women seek an abortion or abortion counselling. What is more, it is a matter of common knowledge that a considerable number of women share petitioners' moral objections to abortion, and petitioners' demonstrations certainly cannot be viewed as discriminating against those women. For these reasons, the actions petitioners take to prevent clinics from performing abortions are not motivated by a bias against women and do not invidiously discriminate against women *as a class* within the meaning of Section 1985(3). As one court has put it: "[I]f the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, because it separates persons of the same gender from each other and, obviously, on a basis other than by gender." *National Abortion Fed'n* v. *Operation Rescue*, 721 F. Supp. 1168, 1171 (C.D. Cal. 1989). Just as there is no gender-specific position concerning other moral questions, so, too, there is no specifically "male" or "female" point of view with respect to abortion.

2. Respondents contend it is irrelevant that petitioners' demonstrations adversely affect only women who seek abortions or abortion counselling, instead of substantially all women. Analogizing petitioner's actions to a hypothetical conspiracy involving racial discrimination, respondents note that obstructing access to the polls could not be defended on the ground that it was directed at only those blacks who seek to exercise their right to vote. Br. in Opp. 10. See *New York State NOW* v. *Terry*, 886 F.2d at 1359-1360. That analogy is erroneous, however, for several reasons.

As explained above, petitioners' demonstrations are not directed exclusively at the women who seek an abortion or abortion counselling; these demonstrations are targeted at everyone—male or female—involved in the abortion process. Respondents also overlook that a substantial number of women oppose abortion. That fact distinguishes this case from *Griffin* v. *Breckenridge*, in which there was no suggestion that a substantial number of blacks opposed granting blacks the right to vote. In other words, petitioners' anti-abortion demonstrations are not a form of gender-based discrimination because they are aimed at a *practice*, not at a type of *person*.

3. The Second Circuit in *New York State NOW* v. *Terry*, 886 F.2d at 1359-1360, and most district courts

that have addressed this question appear to have believed that opposition to abortion is necessarily a form of gender-based discrimination because only women can have abortions. That conclusion, however, rests on a mistaken assumption—that actions with a disproportionate effect on women inevitably discriminate invidiously on the basis of gender. What is true for purposes of the Equal Protection Clause is also true in the case of Section 1985(3): What transforms action having a disproportionate effect on women from the byproduct of otherwise legitimate conduct into invidious discrimination against women per se is the *intent* to disadvantage women as a class of individuals. See *Washington* v. *Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-268 (1977); *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 278-279 (1979). Section 1985(3) does not require a "specific" or "willful" intent to harm class members, as this Court noted in *Griffin*, 403 U.S. at 102 n.10. At the same time, Section 1985(3) is violated only when an individual acts, with or without "scienter," 403 U.S. at 102 n.10, for the purpose of injuring a member of a protected class. The "discriminatory purpose" relevant for the Equal Protection Clause and Section 1985(3) "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker * * * selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r* v. *Feeney*, 442 U.S. at 279 (citation and footnote omitted). That is what *Griffin* meant by its requirement that there must be "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102 & n.10.

Two cases in which this Court has addressed whether pregnancy-based discrimination constitutes gender-based discrimination supply a useful illustration of this point. For example, in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), this Court rejected the contention that a state disability

insurance program violated the Fourteenth Amendment Equal Protection Clause by excluding from coverage pregnancy-related disabilities, even though only women can become pregnant. The Court found that the program was "a far cry from cases like *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), involving discrimination based upon gender as such." *Geduldig* v. *Aiello*, 417 U.S. at 496-497 n.20. This Court reasoned as follows, *ibid.*:

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

Two years later, in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), the Court relied on *Geduldig*'s reasoning in the course of rejecting a challenge based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to a comparable private disability plan. The Court in

Gilbert interpreted *Geduldig* as having held that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not gender-based discrimination at all." 429 U.S. at 136. See also *id.* at 134-135.

Although *Geduldig* did not involve Section 1985(3), the Court's reasoning in that case is applicable here. In fact, this Court's analysis in *Geduldig* applies even more forcefully in the abortion context. Here, as in *Geduldig*, there are two relevant categories—persons involved in the abortion process, and everyone else—and neither class is exclusively female; each category includes both women and men. The analysis in *Geduldig* therefore strongly shows that petitioners' demonstrations are attributable to a factor other than gender-based animus, and, perhaps not surprisingly, as discussed above the district court's factual findings confirm that hypothesis. In sum, just as the insurance programs in *Geduldig* did not discriminate on the basis of gender even though only women can become pregnant, petitioners' opposition to abortion is not gender-based even though only women can have abortions.[14]

To be sure, Congress overruled *General Electric Co.* v. *Gilbert*, *supra*, by adopting the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076,

[14] A different question would be presented if respondents proved that petitioners directed their anti-abortion efforts specifically and exclusively at women because petitioners held an invidiously discriminatory animus against women as a class. Were that true, the demonstrations put on by petitioners would be simply a pretext for discriminating against women, and *Geduldig* v. *Aiello*, 417 U.S. at 496-497 n.20, indicates that such conduct would amount to gender discrimination. Accord *General Electric Co.* v. *Gilbert*, 429 U.S. at 135-136. But respondents made no such allegation in this case; the district court made no such finding; and none of the findings that the district court did make would support a claim of pretext. In fact, the district court expressly found that petitioners were sincerely committed to protecting the fetus and did not find that petitioners harbored any animosity toward women as such. In the district court's words: "It is indisputable that all [petitioners] share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization." Pet. App. 20a. Given that finding, no claim of pretext can be made in this case.

which prohibits employment discrimination on the basis of pregnancy. 42 U.S.C. 2000e(k) (defining discrimination "because of sex" and "on the basis of sex" *under Title VII* to include discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions"). See *International Union, United Automobile, Aerospace & Agric. Implement Workers of America* v. *Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991); *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669 (1983). Congress has therefore drawn a line for purposes of Title VII that differs from the one that this Court drew for equal protection purposes in *Geduldig*. For several reasons, however, the rationale of *Geduldig* is still applicable in this context.

First, the Pregnancy Discrimination Act of 1978 by its express terms did not modify Section 1985(3), which this Court has understood to be aimed at the same kind of invidious discrimination at which the Equal Protection Clause is directed. See *Griffin* v. *Breckenridge*, 403 U.S. at 102; *Carpenters* v. *Scott*, 463 U.S. at 829. Accordingly, the decision in *Geduldig*, 417 U.S. at 496-497 n.20, is still directly relevant. Moreover, regardless of how the Equal Protection Clause should be applied in other settings, this case involves abortion, which is critical to any proper analysis. Even if the Pregnancy Discrimination Act tells us that pregnancy-based decisions that adversely affect women are discriminatory per se, there certainly can be no doubt that opposition to abortion is not, without more, gender-based discrimination. The reason is that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris* v. *McRae*, 448 U.S. 297, 325 (1980). The Pregnancy Discrimination Act itself recognizes that point, because it does not generally compel employers to subsidize abortions for their female employees. 42 U.S.C. 2000e(k) ("This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus

were carried to term, or except where medical complications have arisen from an abortion * * *.").

There are more interests at stake in the abortion decision than those of the pregnant woman. The government has a legitimate interest in protecting both the unborn child and the health of the mother, *Harris* v. *McRae*, 448 U.S. at 324-325; *Roe* v. *Wade*, 410 U.S. 113, 162, 164-165 (1973); the parents of a pregnant minor have a valid interest in participating in their daughter's decision whether to carry her pregnancy to term, *Hodgson* v. *Minnesota*, 110 S. Ct. 2926 (1990); and the father of the child has a personal interest in the pregnant woman's decision. Thus, unlike the condition of being pregnant, the "right" to have an abortion is not a fact that is specific to one gender. Instead, it is a legal right as to which the law can properly assign different interests to various parties.

4. Finally, there can be no serious argument that the 42nd Congress, which passed the Ku Klux Klan Act of 1871, would have believed that Section 1985(3) could be used to obtain damages for actions like those challenged here. The abortion of a fetus after "quickening" was a crime at common law, and state laws condemning or limiting abortion were common when that Act was adopted. In 1871, 28 of 37 States and 8 Territories had such laws. *Roe* v. *Wade*, 410 U.S. at 132-136; *id.* at 174-176 & n.1 (Rehnquist, J., dissenting). Under these circumstances, it is safe to say that "the construction of the statute adopted by the Court of Appeals 'would have amazed the legislators who voted for it.'" *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. at 385 n.7 (Stevens, J., concurring) (citation omitted).

C. Defining The Category As "Women Seeking Abortions" Does Not Further The Correct Analysis Under Section 1985(3)

The district court's opinion also could be read as holding that the class of "women seeking abortions" is a protected class under Section 1985(3). Pet. App. 29a

("[Respondents'] members and patients constitute a subset of a gender-based class meeting these requirements [of *Griffin*]."). Other courts have also defined the protected class in that manner.[15] That description of the class of individuals affected by petitioners' anti-abortion demonstrations, however, does not further analysis of the Section 1985(3) question in this case.

If a Section 1985(3) class could be defined by what its members *do* rather than by who its members *are*, as the district court concluded, a plaintiff could always (and easily) allege that he is a member of a class protected by Section 1985(3) merely by claiming that he belongs to a "class of persons who seek to engage in some action that the defendants have combined to resist through tortious means." For example, animal rights advocates could become a class protected by Section 1985(3) by defining themselves as "individuals who seek to prevent animal cruelty." Likewise, female military personnel could bring themselves under the protection of Section 1985(3) merely by defining themselves members of a subclass of "women who seek to participate in combat."

No material difference exists between the hypothetical classes mentioned above and the class recognized by the district court of "women seeking abortions." A class of "women" describes a group with an immutable characteristic, but a class of "women seeking abortions" is defined in part by reference to the actions of its members, those who seek abortions. That definition is an insufficient basis for allowing a person to obtain relief under Section 1985(3). This Court has determined that a class may not be defined simply by reference to the fact that its members are victims of a conspiracy or hold beliefs that differ from ones held by the co-conspirators. *Carpenters* v. *Scott*, 463 U.S. at 834-835. See *Roe v. Abor-*

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[15] See, *e.g.*, *Cousins* v. *Terry*, 721 F. Supp. 426, 430 (N.D.N.Y. 1989); *Portland Feminist Women's Health Center* v. *Advocates for Life, Inc.*, 712 F. Supp. at 168; *Roe* v. *Operation Rescue*, 710 F. Supp. at 581. Contra *National Abortion Fed'n* v. *Operation Rescue*, 721 F. Supp. at 1171-1172.

tion Abolition Society, 811 F.2d 931 (5th Cir.), cert. denied, 484 U.S. 848 (1987). The Court wrote in *Carpenters* v. *Scott*, 463 U.S. at 850 (citation omitted), that "the intended victims must be victims not because of any personal malice the conspirators have toward them, but because of their membership in or affiliation with a particular class. Moreover, the class must exist independently of the defendants' actions; that is, it cannot be defined simply as the group of victims of the tortious act." The approach endorsed below, however, allows a plaintiff to circumvent that rule by alleging, not that she is the victim of the defendant's tortious acts, but that she engaged in conduct that (coincidentally) caused her to fall victim to the defendant's tort.

Petitioners' opposition to abortion in this respect resembles the class rejected in *Carpenters* v. *Scott*: workers who refused to join a union. 463 U.S. at 839. That category, like the class of "women seeking abortions" asserted here, was defined by nothing more than a mutual desire to exercise a legal right, rather than an immutable characteristic, such as race. To permit such a "class" to invoke Section 1985(3) clearly would reduce the class-based animus requirement adopted in *Griffin* and reaffirmed in *Carpenters* v. *Scott* to nothing more than a rule of artful pleading, and in the process would make Section 1985(3) a "general federal tort law," contrary to that statute's language, purpose, and history. See *Carpenters* v. *Scott*, 463 U.S. at 834-836; *Griffin* v. *Breckenridge*, 403 U.S. at 102.

In sum, defining the class as "women seeking abortions" does not further the analysis, since petitioners conduct demonstrations for the purpose of stopping clinics from performing abortions, not to injure women because of their gender. Even if women are a class protected by Section 1985(3), defining the relevant class in terms of an activity in which women alone can engage does not prove that petitioners' intent is invidious. The fact remains that abortion is a medical procedure that fits into a category all by itself, and it is for the purpose of bringing that singular procedure to a halt that petitioners hold their demonstrations. That intent does not satisfy the animus requirement of *Griffin* and *Carpenters* v. *Scott*.

II. OBSTRUCTING ACCESS TO A MEDICAL FACILITY DOES NOT WITHOUT MORE DEPRIVE OUT-OF-STATE PATIENTS OF THE CONSTITUTIONAL RIGHT OF INTERSTATE TRAVEL

A. The Right To Travel Interstate Is Not Violated In The Absence Of Proof That The Defendant Has Purposefully Discriminated Against Persons Who Travel Interstate

1. In *Griffin* v. *Breckenridge*, this Court ruled that the right to travel interstate—what the Court there termed "the 'right to pass freely from State to State' "—was protected by the Constitution. 403 U.S. at 106, quoting *Twining* v. *New Jersey*, 211 U.S. 78, 97 (1908). According to *Griffin*, this Court's decisions have "firmly established that the right of interstate travel is constitutionally protected," that this right "does not necessarily rest on the Fourteenth Amendment," and that it "is assertable against private as well as governmental interference." 403 U.S. at 105.[16] Finally, *Griffin* also concluded

[16] *Griffin*'s statement that the right to travel interstate "does not necessarily rest on the Fourteenth Amendment," 403 U.S. at 105, understates the uncertainty in this Court's decisions about the source of this constitutional right. Various decisions have located this right in the Privileges and Immunities Clause of Art. IV, § 2, see *Corfield* v. *Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230) (Washington, J., Circuit Justice); *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 43-49 (1867); *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873); *Twining* v. *New Jersey*, 211 U.S. 78, 97 (1908); *Zobel* v. *Williams*, 457 U.S. 55, 78-81 (1982) (O'Connor, J., concurring in the judgment); *Attorney General* v. *Soto-Lopez*, 476 U.S. 898, 920 (1986) (O'Connor, J., dissenting); the Privileges and Immunities Clause of the Fourteenth Amendment, see *Edwards* v. *California*, 314 U.S. 160, 177, 181-182 (1941) (Douglas and Jackson, JJ., concurring); the Commerce Clause of Art. I, § 8, Cl. 3, see

that the right to travel interstate "is within the power of Congress to protect by appropriate legislation." *Id.* at 106, citing, inter alia, *United States* v. *Guest*, 383 U.S. 745, 759 (1966).

The district court held that petitioners' demonstrations violate the rights of women to cross state lines in order to obtain abortions in the Washington, D.C., area, Pet. App. 30a, and the court of appeals affirmed that holding, *id.* at 8a. Significantly, however, there is no factual finding below that one of petitioners' principal goals is directly to interfere with respondents' right to travel interstate, or that interfering with respondents' right to travel interstate is a conscious part of petitioners' strategy of opposing abortion. Nor did the courts below conclude that petitioners' actions in any way discriminated against out-of-state residents.

By finding a violation of the right to travel interstate in the absence of any of the above elements, the courts below expanded that right beyond anything previously recognized in this Court's decisions. Most of this Court's

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The Passenger Cases, 48 U.S. (7 How.) 283 (1849); *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) at 49 (opinion of Clifford, J.); *Edwards* v. *California*, 314 U.S. 160 (1941); the Due Process Clauses of the Fifth and Fourteenth Amendments, see *Kent* v. *Dulles*, 357 U.S. 116, 127 (1958); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 505-506 (1964); *Shapiro* v. *Thompson*, 394 U.S. 618, 671 (1969) (Harlan, J., dissenting); cf. *Califano* v. *Aznavorian*, 439 U.S. 170, 176 (1978); *Haig* v. *Agee*, 453 U.S. 280, 306-307 (1981); and the Equal Protection Clause of the Fourteenth Amendment, see *Zobel* v. *Williams*, 457 U.S. at 60 n.6; *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612, 618 n.6 (1985). See generally *Shapiro* v. *Thompson*, 394 U.S. at 630 n.8; *id.* at 666 (Harlan, J., dissenting); *United States* v. *Guest*, 383 U.S. at 762-770 (opinion of Harlan, J.). See *Attorney General* v. *Soto-Lopez*, 476 U.S. at 902 ("The textual source of the constitutional right to travel, or, more precisely, the right of free interstate migration * * * has proved elusive."); *Zobel* v. *Williams*, 457 U.S. at 60 n.6 ("The right to travel and to move from one state to another has long been accepted, yet both the nature and the source of that right have remained obscure."). In sum and in truth, to borrow a metaphor from Judge Friendly, the constitutional right to travel is a legal Lohengrin: no one knows from whence it came. Cf. *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

recent interstate travel cases "have dealt with state laws that, by classifying residents according to the time they established residence, resulted in the unequal distribution of rights and benefits among otherwise qualified bona fide residents." *Attorney General* v. *Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality opinion), citing *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel* v. *Williams*, 457 U.S. 55 (1982); *Sosna* v. *Iowa*, 419 U.S. 393 (1975); *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). Yet as noted above, respondents did not allege that petitioners' activities somehow classify women seeking abortions according to their residence, or result in the unequal distribution of abortions performed in and among the various States represented in the District of Columbia metropolitan area.

In the absence of discrimination against out-of-state residents, this Court has found a violation of the right of interstate travel only when it was proven that a defendant intended to violate that right as one of his principal goals. For example, the Court in *Griffin* v. *Breckenridge*, 403 U.S. at 106 (emphasis added), allowed plaintiffs to take their interstate travel claim to trial because it was open for them to prove at trial that "their federal right to travel interstate was one of the rights *meant* to be discriminatorily impaired by the conspiracy, that the conspirators *intended* to drive out-of-state civil rights workers from the State, or that they *meant* to deter the petitioners from associating with such persons." Similarly, in *United States* v. *Guest*, *supra*, this Court upheld an indictment under 18 U.S.C. 241 [17] that alleged a

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[17] 18 U.S.C. 241 generally tracks Section 1985(3). It provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his

conspiracy to interfere with the right to travel. See 383 U.S. at 757. In so doing, the Court explained, *id.* at 760 (emphasis added):

> [A] conspiracy to rob an interstate traveler would not, of itself, violate § 241. But if the *predominant purpose* of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person *because of* his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought.

Under 18 U.S.C. 241, as under Section 1985(3), an effect on individuals travelling interstate does not suffice to state a claim based on interference with the right to travel interstate.[18]

It is easy to understand why the Court has been careful to limit the right to interstate travel in the above manner. If that right encompassed *any* activity that had *any* effect on interstate travel, almost every public or private action could be transformed into a violation of the federal constitutional right. For example, a health code inspector and restaurant owner who conspire to close a competitor's restaurant allegedly for health code violations, or two arsonists who conspire to destroy a restaurant, evidently would be trenching on the right to travel interstate, because they would have made it impossible for out-of-state customers to enter a State to do business

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free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

[18] See also *Shapiro* v. *Thompson*, 394 U.S. at 629, 631 ("the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible.").

with the restaurant owner. Airline travelers would have a constitutional cause of action for damages against airline companies each time two companies conspire to hike their fares on interstate flights, since higher fares make it more expensive and, hence, more difficult to travel interstate. Similarly, lifeguards who go on strike in order to close a summer beach resort violate the constitutional rights of every person who would otherwise have traveled across state lines to spend a vacation at the beach. The potential for such claims is limitless. Cf. *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

Although *Griffin* acknowledged that the actions of private parties can give rise to a damages action under Section 1985(3), it would be a mistake to equate the actions of private parties with those of the State in all instances. Cf. *United States* v. *Guest*, 383 U.S. at 772 (Harlan, J., concurring in part and dissenting in part) ("There is a difference in power between States and private groups so great that analogies between the two tend to be misleading. If the State obstructs free intercourse of goods, people, or ideas, the bonds of the union are threatened; if a private group effectively stops such communication, there is at most a temporary breakdown of law and order, to be remedied by the exercise of state authority or by appropriate legislation.") That is not to say that a plaintiff must prove he was in fact deterred from travelling interstate, or that temporary deprivations are permissible. On the contrary, "even temporary deprivations of very important benefits and rights can operate to penalize migration." *Attorney General* v. *Soto-Lopez*, 476 U.S. at 907 (plurality opinion), citing *Shapiro*, *Memorial Hospital* v. *Maricopa County*, and *Dunn*, all of which involved residency requirements. The point is that ordinary torts should not be deemed to give rise to a constitutional claim simply because they may have some effect on persons who travel interstate.

2. The cases in which the Court has found a violation of the right to travel in the abortion context are consist-

ent with the limitations that the Court has imposed on that right elsewhere. For example, *Doe* v. *Bolton*, 410 U.S. 179 (1973), held invalid a Georgia law excepting from the State's general criminal abortion law abortions performed on state residents. *Id.* at 184, 200. Because the statute in *Doe* discriminated against out-of-state residents, that case, like *Soto-Lopez*, *Hooper*, *Zobel* and the other cases cited above, involves the unequal distribution of rights based on residency classifications.

In *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), the Court struck down under the First Amendment a Virginia statute prohibiting any person, by the sale or circulation of any publication, to encourage the processing of an abortion. The defendant in *Bigelow* was the managing editor of a weekly newspaper that published, in Virginia, a New York City organization's advertisement that it would arrange low-cost abortions in New York City. In holding that law invalid, this Court stated that it was lawful for Virginia residents to take advantage of the abortion services advertised in petitioner's newspaper because, among other reasons, Virginia could not "prevent its residents from traveling to New York to obtain [abortion] services or * * * prosecute them for going there." 421 U.S. at 824, citing *United States* v. *Guest*, 383 U.S. at 757-759; *Shapiro* v. *Thompson*, 394 U.S. at 629-631; *Doe* v. *Bolton*, 410 U.S. at 200. For a State either to "prevent" its citizens from travelling to another State, or to prosecute them after-the-fact for making such a trip, would directly and purposefully interfere with their right of interstate travel in a manner similar to what transpired in *Griffin* and *Guest*. Indeed, it is particularly noteworthy that *Bigelow* focused on those forms of interference with the right to travel interstate. Theoretically, a State could interfere with a woman's right to travel interstate to obtain an abortion in any number of indirect ways, such as by raising highway taxes, thereby making it more expensive to travel. But this Court steered far clear from recognizing such an

indirect, nonpurposeful violation of the right to travel, perhaps because virtually any State or private action could trigger a damages action were such claims allowed.

B. Petitioners' Demonstrations Did Not Violate Respondents' Right To Travel Interstate

In this case, the district court did not find as a fact that petitioners hold demonstrations *for the principal purpose of* directly preventing respondents from exercising their right to travel interstate, nor did either court below conclude that petitioners' actions discriminated against out-of-state residents. Petitioners' actions, according to the court's below, were tortious under Virginia law, but those actions did not constitute a violation of respondents' right to travel interstate under the federal Constitution. Accordingly, the judgment below should be set aside.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTE INVOLVED

42 U.S.C. 1985(3), which was originally enacted as Section 2 of the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, provides as follows:

> **(3) Depriving persons of rights or privileges**
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> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

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